In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1252

DONALD L. WAMP, et al,
Petitioners,

vs.

CHATTANOOGA HOUSING AUTHORITY, et al,
Respondents.

JOINT BRIEF OF THE RESPONDENTS, CHATTANOOGA HOUSING AUTHORITY AND CITY OF CHATTANOOGA, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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Respondents, the Chattanooga Housing Authority (CHA) and City of Chattanooga, Tennessee (City), respectfully submit that no Writ of Certiorari should issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit, which Court affirmed the judgment and opinion of the United States District Court for the Eastern District of Tennessee, Southern Division.

OPINIONS BELOW

The opinion of the Court of Appeals, filed December 5, 1975, is reported at 427 F.2d 595 and is also appended to the Petition for Writ of Certiorari at page A15. The opin-

ion of the District Court is reported at 384 F.Supp. 251 and is appended to the Petition for Writ of Certiorari at page A1. This Brief will follow the reference to appendices used by petitioners; see Petition, page 2 n. 1.

JURISDICTION

These respondents do not question the jurisdiction of this Court under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

In addition to the facts set out in the Petition, pages 2-5, it should be noted that the petitioners had a full evidentiary hearing in the district court on a motion for preliminary injunction, *Wamp* v. *Chattanooga Housing Authority,* 384 F.Supp. 251, 253 (E.D. Tenn. 1974). On the issue of standing, the trial judge made specific findings of fact, 284 F.Supp. at 254-55, which petitioners have never shown or even argued to be clearly erroneous. The district court applied the Tennessee law of standing in reviewing the original complaint since its jurisdiction was derivative from that of the state court where the case was filed prior to removal by the federal defendants. Respondents, Chattanooga Housing Authority (CHA) and City of Chattanooga (City) therefore submit that the only issue presented is:

> Whether the district court and court of appeals were correct in holding that the district court had no jurisdiction of this action upon removal from state court because the state court had no jurisdiction under Tennessee rules of standing to challenge administrative acts of public instrumentalities.

STATUTES INVOLVED

Petitioner herein relied on two federal statutes, 42 U.S.C. 1455 (a) (ii) and 42 U.S.C. 1455 (e).

42 U.S.C. 1455 (a), set out on pages 6-7 of the Petition and relied on by petitioners, was repealed by Act August 22, 1974, P.L. 93-383, Title II, § 204, 88 Stat. 568.

42 U.S.C. 1455 (e):

> "(e) *Public disclosure by redevelopers.* No understanding with respect to, or contract for, the disposition of land within an urban renewal area shall be entered into by a local public agency unless the local public agency shall have first made public, in such form and manner as may be prescribed by the Secretary, (1) the name of the redeveloper, together with the names of its officers and principal members, shareholders and investors, and other interested parties, (2) the redeveloper's estimate of the cost of any residential redevelopment and rehabilitation, and (3) the redeveloper's estimate of rentals and sales prices of any proposed housing involved in such redevelopment and rehabilitation: *Provided, That nothing in this subsection shall constitute a basis for contesting the conveyance of, or title to, such land.*" (Emphasis supplied.)

STATEMENT OF FACTS

CHA and City submit the following additions or changes to the petitioners' *Statement of Facts,* Petition, pages 7-19.

As discussed more fully below, a full evidentiary hearing was held by the district court, which made findings of fact on the question of standing, the principle issue on appeal and here. Petitioners have never challenged these findings as clearly erroneous.

Implementation of the "Golden Gateway Urban Renew-

al Program" was commenced in July, 1958, under the name "Westside Urban Renewal Project." Mr. Billy Cooper, a witness subpoenaed by plaintiffs, has been Exeeutive Director of CHA since before the commencement of the program. In connection with the lowering of Cameron Hill in the early stages of the program, petitioner Moccasin Bend Association had sued to enjoin this action and the consequent destruction of Boynton Park. This litigation, as the district court found, resulted in an adjudication by the Supreme Court of Tennessee that " 'the bill fails to show any proposed illegal action of the Housing Authority' and 'these complainants are entitled to no rights in the Boynton Park other than those common to all citizens of Chattanooga.' *See, Mrs. Sims Perry Long, et al.* v. *Chattanooga Housing Authority, et al.* (unpublished opinion entered November 9, 1962.)" (Opinion, 384 F.Supp. at 252.) The Court of Appeals also cited this case, 427 F.2d at 596.

The amendment of the reuse plan in 1968 as well as the original plan called for residential development on Cameron Hill (R. 88-89).

During all negotiations with Future Chattanooga Development, the only bidder for development in 1969, and Broadmoor Shopping Centers, Inc., its joint venturer added by permission of CHA in May, 1972, it was shown that the principal of Broadmoor was Lyle A. Rosenzweig and that he was trustee for the majority interest in the successor of that joint venture, Cameron-Oxford Associates (R. 63). In fact, petitioners' counsel, in direct examination admitted that the public notice of the involvement of Cameron in November, 1973, disclosed the position of the same Lyle A. Rosenzweig (R. 66). CHA always deemed Cameron as an assignee of its June, 1972, contract with Broadmoor (R. 67-68).

Petitioners engage in pure speculation at page 11 of their Petition in asserting the future intentions of CHA or other respondents. The inaccuracy of these assertions as to disclosure is discussed, *supra*. In any event, petitioners do not rely here on the statutory requirements of disclosure, 42 U.S.C. § 1455 (e), for the obvious reason, discussed below, that the concluding terms of the statute state that its violation shall not be the basis for any action contesting the conveyance of land.

Petitioners note at page 13 of their Petition that as of February 12, 1974, no construction had commenced but thereafter began. Construction of the project by Cameron and of the park by the City was never enjoined or abated by the Court. CHA and City represent to this Court that construction of both the 254 units and the park as originally challenged is now complete. CHA has made no other commitments with Cameron for additional development on Cameron Hill. The City has not engaged in direct or indirect supervision of the residential development being done by Cameron.

Neither CHA nor City have any statutory duties under the National Environmental Policy Act (NEPA) discussed at length by petitioners, pages 15-16. These respondents will note, however, that petitioners represented to the Court of Appeals that they had tried their case in full before the district court (Appellants' Appellate Brief, page 6), although the district court did not make any findings on the environmental issues, having held that it was without jurisdiction to allow the amendment raising these issues. The United States presented proof on fulfillment of its statutory obligations under NEPA in regard to the Cameron-Oxford development and loan guarantee and will presumably discuss these points in its Brief. CHA and City

suggest that the district court's findings of fact relative to standing would vitiate petitioners' right to litigate NEPA issues in a federal court.

REASONS FOR NOT GRANTING THE WRIT

A. The Holding.

The district court held that its jurisdiction on removal was derivative from that of the state court where the suit was originally filed and that the state court had no jurisdiction since no plaintiffs had standing to file the original action against the City or CHA. In Tennessee, standing is jurisdictional. (The original joinder of the private parties was apparently deemed necessary for the full relief sought; the original joinder of the United States is a conundrum since no relief was sought against the federal government.) Collaterally, the district court refused to allow the proposed amendment to interject the environmental issue, saying, essentially, that jurisdiction could not be conferred by amendment where absent *ab initio*.

B. The District Court Correctly Decided Its Own Removal Jurisdiction.

There is no question that the removal jurisdiction of a federal district court derives from the jurisdiction of the state court where the suit was originally filed; in its absence, the suit must be dismissed. *Lambert Run Coal Co.* v. *Baltimore & Ohio R. Co.*, 258 U.S. 377 (1922); *Venner* v. *Michigan Central R. Co.*, 271 U.S. 127 (1926); *Freeman* v. *Bee Machine Co.*, 319 U.S. 448 (1943). This rule applies even if the suit filed in state court and thence removed was one over which a federal court had exclusive jurisdiction. Thus, a district court had no jurisdiction to entertain a suit filed in a state court against the United

States under the Federal Tort Claims Act and then removed to federal court, even though there was exclusive original jurisdiction in federal court. *Gleason* v. *United States*, 458 F.2d 171 (3d Cir. 1972); *see, also, Steele* v. *G. D. Searle & Co.*, 483 F.2d 339 (5th Cir. 1973). Defects which defeat state court jurisdiction under state law will defeat removal jurisdiction even if they are not jurisdictional defects under federal rules and could be cured. *E.g., Curtis Publishing Co.* v. *Cassell*, 302 F.2d 132 (10th Cir. 1962) (insufficient service of process).

The Court of Appeals followed *Lambert Run Coal Co.* v. *Baltimore & Ohio R. Co., supra*, and thus correctly sustained the district court's holding, 527 F.2d at 597.

The district court held it derived no jurisdiction from the state court because petitioners lacked standing there under Tennessee law, citing *Patton* v. *City of Chattanooga*, 108 Tenn. 197, 65 S.W. 414 (1901), as applied recently in *Badgett* v. *Rogers*, 222 Tenn. 374, 436 S.W.2d 292 (1968), a line of cases holding that (1) standing of a citizen or taxpayer to sue a state or local governmental instrumentality is *jurisdictional*, and (2) that there is no standing in the absence of allegation of either illegal use of public funds or a special injury to the plaintiff different in character and kind from that to be suffered by the citizenry at large from the alleged wrong. The Court of Appeals found the district court correctly construed and applied the controlling Tennessee decisions, citing the later cases of *Sachs* v. *County Election Comm'n*, 525 S.W.2d 672 (Tenn. 1975), and *Bennett* v. *Stutts*, 521 S.W.2d 575 (Tenn. 1975), in addition to *Patton* v. *City of Chattanooga, supra*, and *Badgett* v. *Rogers, supra*. 527 F.2d at 596.

While petitioners here and in the Court of Appeals attempted to distinguish *Badgett* v. *Rogers, supra*, factually,

in that the case at bar involved an alleged mismanagement of public property, the petitioners have failed anywhere to illustrate from the record that the district court's findings of fact to the contrary were clearly erroneous. There is, therefore, no basis for review of the finding. Moreover, where an improper diversion of public money or property from its proper use is alleged, plaintiffs must show fraud and corruption in order to attain standing in Tennessee courts. *Pope* v. *Dykes,* 116 Tenn. 230 (1930).

Petitioners' reliance on *Bennett* v. *Stutts,* 521 S.W.2d 575 (Tenn. 1975), is misplaced. (Petition, 21-22.) The record will reflect that process was issued and a copy of the original complaint was served on the Attorney General of Hamilton County as prayed. The evidentiary hearing in the district court considered the question of standing and also explored the merits of the case, and the district court found the case wanting in both respects; *see, Wamp* v. *Chattanooga Housing Authority, supra,* 384 F.Supp. at 255-56. (The only possible instance of illegal conduct by CHA noted by the Court, violation of 42 U.S.C. § 1455 (e), is not here relied upon by petitioners, and said statute, by its own terms, precludes the relief sought by petitioners.) Thus, the district court made the two negative findings which, under *Bennett* v. *Stutts, supra,* would excuse the lack of intervention by the state attorney general and warrant dismissal of the suit. Therefore, no reason is presented for issuance of a writ of certiorari in this regard.

It is submitted that both lower courts correctly applied the Tennessee law in finding that petitioners had no standing before the Chancery Court to sue CHA or the City.

Moreover, the Chancery Court had no jurisdiction over the federal defendants. The original complaint alleged at most an improper agency decision by HUD officials in administering the local urban renewal program. State

courts have no jurisdiction to review such discretionary actions of federal officers taken under federal law. *Rogers* v. *Calumet National Bank,* 358 U.S. 331 (1959).

The non-governmental defendants in the Chancery Court were necessary parties to the complete relief sought; in the absence of jurisdiction over CHA, the City, or HUD, however, the state court had no case before it in which to review actions of these other defendants. Thus, the district court properly held that there was no jurisdiction of the suit as filed.

To avoid the effect of the Tennessee jurisdictional rule in *Patton* v. *City of Chattanooga, supra,* and *Badgett* v. *Rogers, supra,* petitioners maintain here that they could have sued in state court to challenge aspects of federally funded housing or redevelopment plans. The cases they cite are inapposite, however, and do not support this proposition.

City of Buffalo v. *Mollenberg-Betz Machine Co.,* 279 N.Y.S.2d 842 (S.Ct. 1966), was an eminent domain case involving an attempt of a landowner to obtain in state court removal expenses allowable under 42 U.S.C. § 1405 in excess of amounts provided by state law. Plaintiff urged that federal statute and regulations conferred jurisdiction to award the larger sum. The Court disagreed, holding that the federal statute did not so enlarge the jurisdiction of the court beyond the scope allowed by New York law.

Alaska State Housing Authority v. *Contento,* 432 P.2d 117 (1967), was another eminent domain proceeding wherein the state court likewise refused enhanced removal expenses authorized by federal but not state law.

Town of Brookline v. *Brookline Development Authority,* 183 N.E.2d 484 (1962), involved a suit by a town to enjoin the local redevelopment agency from conveying land to a proposed developer without meeting the requirements of

42 U.S.C. § 1455 (e). The United States was not a party, and the question of jurisdiction apparently was not raised, because in midstream the local redevelopment authority agreed with the town that it should not convey and ultimately was adverse on this point to its co-defendant, the developer.

To the contrary, for example, in *Hunter* v. *New York,* 121 N.Y.S.2d 841, the state court held that tenants in a federally supported redevelopment area had no standing to sue in state court to enjoin a project for failure to comply with the requirements of federal law, finding that Congress had not expressly authorized suits to challenge acts, determinations, or the exercise of discretion of the federal administrator of the Federal Housing Act and that, even if plaintiffs had standing, the state courts had no jurisdiction over the acts of federal officials acting as such in the administration of federal laws. Likewise, in *Johnson* v. *Redevelopment Agency,* 317 F.2d 872 (9th Cir. 1963), *cert. denied* 375 U.S. 915, it was held that a loan and capital grant contract between such agencies and the United States is governed by federal law so that persons not parties to such contracts have no standing to enforce conditions imposed therein upon local redevelopment agencies. Certainly, under this case, the petitioners here had no standing to interfere with the decisions of CHA approved by HUD in the Tennessee chancery courts.

Mid-Continent Pipe Line Co. v. *Hargrave,* 129 F.2d 655 (10th Cir. 1942), holds that state and federal courts are vested with concurrent jurisdiction of suits of a civil nature arising under the laws of the United States except where Congress has expressly limited the jurisdiction to federal courts. For the federally grounded action to be brought in a state court, however, the state court must be one of com-

petent jurisdiction under state law. Congress has no power to confer jurisdiction over a case on a state inferior court which the state, whether legislatively or judicially, has withheld from that court. A provision in an act of Congress giving state courts concurrent jurisdiction with federal courts neither enhances nor restricts the general jurisdiction of the state courts.

In *Herb* v. *Pitcairn,* 324 U.S. 117 (1945), this Court held that certain suits under the Federal Employers' Liability Act could not be maintained in a city court when the relevant state's supreme court had held that no suits could be maintained in the city court for injuries occurring beyond the territorial jurisdiction of the city. Writing for the majority, Mr. Justice Jackson held:

> "Whether any case is pending in the Illinois courts is a question to be determined by Illinois law, as interpreted by the Illinois Supreme Court. For we have said of the Federal Employers' Liability Act, 'we deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts, or to control or affect their modes of procedure, but only a question of the duty of such a court, *when its ordinary jurisdiction, as prescribed by local laws, is appropriate to the occasion, and is invoked in conformity with those laws,* to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress, and susceptible of adjudication according to the prevailing rules of procedure,' " citing *Mondon* v. *N.Y., N.H. & H. R. Co.* (Second Employers' Liability Cases), 223 U.S. 1, 56, 57. (Emphasis supplied.) 324 U.S. at 120.

Thus, when the state court has no jurisdiction over local governments by virtue of the lack of standing of the plaintiffs, as in the Tennessee decisions discussed herein, the state court has no jurisdiction to entertain an action

brought by such plaintiffs allegedly arising under federal statute.

C. The District Court Was Not Required To Apply Federal Standing Principles.

Contrary to petitioners' assertions at page 23 of the Petition, the state court would not have been obliged to apply federal standing cases to a suit filed in state court raising federal questions. The logic of *Herb* v. *Pitcairn, supra,* dictates that state courts apply their own jurisdictional rules to cases brought in state courts. State decisional law governs access to state courts against local, private, or non-federal defendants. *Griffin* v. *McCoach,* 313 U.S. 498 (1941). *See, Dine* v. *Edwards,* 158 F.2d 17 (7th Cir. 1947). The Supreme Court of Tennessee has held that standing to sue a municipality and other state instrumentalities such as CHA is a question of substantive law to be decided by reference to the constitution, statutes, and decisions of Tennessee, since the question is one of the public policy of the sovereign, even when federal decisions might produce a contrary result. *Scates* v. *Board of Commissioners of Union City,* 196 Tenn. 274, 265 S.W.2d 536 (1954).

Even if the presence of federal questions might persuade the state court to follow federal standing rules as to the City and CHA, petitioners appear to have abandoned in this Court their original reliance on violation of 42 U.S.C. § 1455 (b) and (e) (Complaint 19A) and 42 U.S.C. § 1454 (a) (18A), and now cite only 42 U.S.C. § 1455 (a), which was repealed by Act August 22, 1974, P.L. 93-383, Title II, § 204, 88 Stat. 668. The earlier reliance on violation of 42 U.S.C. § 1455 (b) and (e) was obviously misplaced as to CHA under the facts of the case. The terms of 42 U.S.C. § 1455 (b) require the local agency to require the delevopers to commence the renewal project within a

reasonable time. Any alleged failure of CHA in this regard was moot once the construction commenced. The provisions of 42 U.S.C. § 1455 (e) require certain disclosures about the developer to which land is to be sold. The very last provision of this section states, however:

> "Provided, That nothing in this subsection shall constitute a basis for contesting the conveyance of, or title to, such land."

The district court specifically found no violation of 42 U.S.C. § 1455 (a) (ii), 384 F.Supp. at 256, after plenary hearing of the issue. No violation of federal law was alleged as to the City.

Since the petitioners here assert and can assert no federal statutory violations by CHA or the City which would be actionable at present in district court, the question of the proper rules of standing to be applied by the district court in ascertaining the jurisdiction of the chancery court would appear now to be moot.

D. Petitioners Had No Standing Under Federal Law.

Even if the federal district court were required to apply federal standing principles, both the original complaint and the attempted amendment fail to show the requisite standing under the most recent decisions of this Court.

After reviewing the *evidence* on the issue of standing, the district court commented:

> "Suffice it to say in summary, the interest of each individual plaintiff is that of a civic minded taxpayer of the city or county wherein Cameron Hill is located. The interest of the corporate plaintiff is that of an association concerned with the preservation of local scenic and historic landmarks. Neither plaintiff asserts any ownership in Cameron Hill or any economic or

financial interest in its disposition other than as taxpayers or, in the case of Moccasin Bend Association, as a civic improvement organization. Nor do they claim any special injury to themselves, different from that which might be asserted by any civic minded taxpayer or by any association concerned with the preservation and enhancement of local areas having scenic and historic attributes." 384 F.Supp. 254-55.

Petitioners do not argue that the findings of fact on which these conclusions were based are clearly erroneous.

Here, as on appeal, petitioners rely on *United States* v. *SCRAP,* 412 U.S. 669 (1973), as applicable to them, notwithstanding the findings of the trial court. To this reliance in the appeal below the Court of appeals responded:

"Even if federal standing decisions were applicable, appellants would be met by the decisions of this court in *Gibson & Perin Co.* v. *City of Cincinnati,* 480 F.2d 936 (6th Cir. 1973), *cert. denied,* 414 U.S. 1068, 94 S.Ct. 577, 38 L.Ed.2d 473 (1973); and *South Hill Neighborhood Association* v. *Romney,* 421 F.2d 454 (6th Cir. 1969), *cert. denied,* 397 U.S. 1025, 90 S.Ct. 1261, 25 L.Ed.2d 534 (1970)." 527 F.2d at 597 n. 1.

Gibson & Perin Co. was decided after this Court's decision in *United States* v. *SCRAP, supra,* and in both cases cited by the Court of Appeals the plaintiffs had more of a personal stake in the outcome than was illustrated in the evidentiary hearing in the instant case by any of the petitioners. Moreover, it is urged that the holdings in *Gibson & Perin Co.* and *South Hill Neighborhood Association* have been, in effect, affirmed on the issue of standing by *Warth* v. *Seldin,* — U.S. —, 45 L.Ed.2d 343 (1975), decided during the pendency of the instant appeal below. In that case this Court required allegations of particular injuries to individual plaintiffs to challenge local zoning and hous-

ing policies (not unlike the Tennessee rule); an actual and apparent non-conjectural relation between injuries of plaintiffs suing as taxpayers and the defendants' actions; and palpable economic injury in fact from defendants' actions to individuals, not mere assertion of the putative rights of third parties whom such individuals did not in fact represent. None of these bases for standing appear in this case. Moreover, in the instant case, petitioners had a full evidentiary hearing before the trial court decided that petitioners had no standing, unlike *Warth* v. *Seldin* (see Douglas, J., dissenting). The petitioners obviously had no standing to challenge the City's actions relative to Boynton Park or CHA's approval of the development under the principles enunciated in *Warth* v. *Seldin, supra.* Thus, the Petition states no question for review in regard to standing of the petitioners.

E. Conclusion.

CHA and City submit that the issues presented by petitioners are insubstantial and do not qualify under any of the advisory criteria of section 1. (b) of Rule 19 of the Supreme Court for issuance of a Writ of Certiorari. Therefore, and for the reasons set forth herein, it is respectfully submitted that the Petition should be denied.

Respectfully submitted,

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